

Wandaka (Migration) [2021] AATA 2152 (31 March 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Evalyn Mweru Wandaka
CASE NUMBER:	1923208
HOME AFFAIRS REFERENCE(S):	BCC2019/1996299
MEMBER:	Mark Bishop
DATE:	31 March 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 31 March 2021 at 10:21am

CATCHWORDS

MIGRATION –Student (Temporary) (Class TU) visa – subclass 500 (Student) visa– primary persons’ student visa ceased – at the time of decision primary applicant is not the holder of a Student visa – genuine de facto relationship – decision under review affirmed

LEGISLATION

Migration Act 1958, s 65

Migration Regulations 1994, r 2.03A, Schedule 2, cl 500.311

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 30 July 2019 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 18 April 2019. At the time of application, Class TU contained two subclasses: Subclass 500 (Student) and Subclass 590 (Student Guardian). The applicant applied for the visa to undertake study in Australia and does not claim to meet the criteria for a Subclass 590 (Student Guardian) visa.
3. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.311 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the primary person failed to prove they had been in a de facto relationship with the review applicant for at least 12 months when he applied for a student visa.
4. In this review application the primary person is Joseph Chege KIBUNJA. At the time of application he was the holder of a Student visa. At the time of decision he is not the holder of a Student visa. He is the holder of a Bridging visa. In evidence to the Tribunal he advised his Student visa ceased on 15 March 2021 (see under at paragraphs 15 to 18). In this case the secondary person and the review applicant are the same person, Evalyn Mweru WANDAKA.
5. The applicant appeared before the Tribunal on 21 March 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the primary person Mr Joseph Chege KIBUNJA.
6. The applicant was assisted in relation to the review by their registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The criteria for a Subclass 500 (Student) visa are set out in Part 500 of Schedule 2 to the Regulations. The primary criteria in cl.500.211 to cl.500.218 must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need only satisfy the secondary criteria. The issue in the present case is whether in the words of cl.500.311 of Schedule 2 to the Migration Regulations “the applicant is a member of the family unit of a person (the primary person) who holds a student visa...” (see paragraph 9 immediately below).
9. The issue in this case is whether the applicant meets cl.500.311 of Schedule 2 to the Migration Regulations which relevantly states:

500.311

10. *The applicant is a member of the family unit of a person (the primary person) who holds a student visa, having satisfied the primary criteria for that visa, and either:*

11. (a) *the applicant became a member of the family unit of the primary person before the grant of the student visa to the primary person, and was included in:*

(i) the primary person's application under subregulation 2.07AF(3); or

(ii) information provided in relation to the primary person's application under subregulation 2.07AF(4);

(b) the applicant became a member of the family unit of the primary person:

after the grant of the student visa to the primary person;

(ii) and before the application was made.

12. On 30 July 2019 the delegate found as follows:

- The applicant applied for a subsequent entrant dependent student (Subclass 500) visa on 18 April 2019 on the basis that she was the member of the family unit of a person holding a student visa, Joseph Chege KIBUNJA.
- The delegate found there was insufficient information provided at the time of lodgement to prove the review applicant and primary person had been in a de facto relationship for at least 12 months before the date of lodgement.
- On 18 June 2019 the Department requested further information to establish the review applicant and primary person were in a relationship and this relationship had been ongoing and exclusive for at least 12 months prior to lodging their application.
- On 15 July 2019 the Department received further documentation in support of the applicant's application. The delegate considered these documents.
- The delegate found that although the primary person and review applicant were in a genuine and continuing relationship could not prove they had been in a de facto relationship for a period of at least 12 months from the time of the primary person visa lodgement. The delegate made a finding that the secondary person (review applicant) did not meet Regulation 2.03A and therefore does not meet the criteria set out in cl.500.311 of the Regulations.

13. The applicant provided the following information to the Tribunal:

- Passport Copy of Evalyn Mweru WANDAKA
- Appointment of Authorised Representative form
- Images of couple
- Birth Certificate of son Isaac John Chege 18 June 2020
- Joint Trust Account Receipt dated 28 January 2021
- Joint Bank Statement dated 22 March 2021
- Gikiuhi Regina Payslip for the periods of 15 February 2021 to 14 March 2021
- Summary of Earnings Andrew (Gikiuhi) Mwaura for the period of 22 February 2021 to 7 March 2021
- Income Statement Dnata Airport Services 2019-2020

- Income Statement Melbourne Health 2019-2020
- Statutory declaration from Andrew (Gikiuhi) Mwaura dated 24 March 2021 outlining the group certificates and pay slips are true copies of the original.
- Statutory declaration from Gikuhi Regina dated 24 March 2021 outlining the group certificates and pay slips are true copies of the original.

14. Timeline of visa applications

- The primary person Joseph Chege KIBUNJA applied for a student visa on 28 May 2015.
- The primary person Joseph Chege KIBUNJA student visa application was approved on 15 July 2015.
- Review applicant and primary person state they were in a boyfriend/girlfriend relationship since 2017.
- The review applicant Evalyn Mweru WANDAKA applied for a student (Subsequent entrant) visa on 18 April 2019.
- The primary person Joseph Chege KIBUNJA student visa ceased on 30 August 2019.
- The primary person Joseph Chege KIBUNJA applied for a student visa on 30 August 2019.
- The primary person Joseph Chege KIBUNJA student visa ceased on 15 March 2021.
- The primary person Joseph Chege KIBUNJA gave evidence to the Tribunal his Student visa ceased on 15 March 2021 and he currently resided in Australia as the holder of a Bridging visa. He further advised the Tribunal he intended to remain in Australia at the conclusion of his work placement and would apply for permanent residence.
- The applicant gave evidence to the Tribunal she was aware the student visa of the primary person had expired and he currently resided in Australia as the holder of a Bridging visa.

15. The Tribunal examined the file and the Tribunal is satisfied that the finding of the delegate is correct.

16. The Tribunal has considered the written information and oral evidence provided by the applicant. The applicant and primary person have lived together in a de facto relationship since May 2018. They are the parents of a child. They intend to be married in Australia when Covid restrictions are lifted and family from Kenya can attend the ceremony. The Tribunal is satisfied the applicant and primary person have been in an exclusive relationship since they became boyfriend and girlfriend in 2017. The Tribunal finds the applicant and primary person have been in a genuine de facto relationship since May 2018. The applicant and the primary person became engaged to be married in February 2019 in Sydney whilst attending a social event. The applicant lodged her application for a Student (Temporary) (class TU) (Subsequent Entrant) (subclass 500) visa on 18 April 2019.

17. In evidence the primary person advised the Tribunal his Student visa ceased to have effect on 15 March 2021 and he currently holds a Bridging visa. Such visa is not a Student visa.
18. In evidence the applicant advised the Tribunal she was aware prior to the hearing the primary persons' student visa ceased on 15 March 2021 and he now resided in Australia as the holder of a Bridging visa.
19. The Tribunal explained to the applicant and the primary person that the primary person did not hold a current Student visa and accordingly in the current review application the Tribunal could not make a favourable decision. All parties advised they understood the explanation of the Tribunal. The Tribunal further explained the applicant had rights to appeal an unfavourable decision to the Federal Circuit Court of Australia (FCCA). The applicant advised she was aware of her rights.
20. As the primary person does not hold a current Student visa the applicant does not satisfy the requirements of cl.500.311 of the Regulations.
21. The Tribunal has considered the advice of the applicant, primary person, written submissions and attached statutory declarations. As the primary person does not hold a current Student visa it is not necessary to consider and determine the issue that was before the delegate.
22. The Tribunal does not have any discretion to waive the requirements set out in cl.500.311 of the Regulations. There is nothing that allows the Tribunal to go behind the plain meaning of cl.500.311 of the Regulations.
23. Accordingly, the Tribunal is not satisfied that the applicant meets cl.500.311 of the Regulations.
24. Given the above findings, the Tribunal finds that the criteria for the grant of a Subclass 500 (Student) visa are not met. The applicant does not claim to meet the criteria for a Subclass 590 (Student Guardian) visa. Accordingly, the decision under review must be affirmed.
25. **DECISION**
26. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.
27. Mark Bishop
28. Member